



Evidence in liability law an introduction

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Introduction

- **Evidence** can make the difference in **tort law** proceedings



Introduction

- **Goal:** highlight some common characteristics regarding the administration of evidence in European tort law.
- **Limitation**
 - Basic constituents in fault liability
 - Limited to five legal systems (Belgium, the Netherlands, Germany, France, and Switzerland)



I. Principles of European Tort Law

- **No generally worded provision** on the burden of proof
- **Art. 2:105. Proof of damage:** *“Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly”*
- **Question:** What about
 - proof of fault?
 - proof of causation?



II. Proof of fault

- **Variety** in conceptualisation of unlawful act

Belgium	art. 1382 BW	objective element & subjective element
France	art. 1382 CC	objective element
The Netherlands	art. 162 BW	unlawful act & attribution to tortfeasor
Germany	§ 823 BGB	violation of a normative rule (<i>Tatbestand</i>), unlawfulness (<i>Rechtswidrigkeit</i>) & intention or negligence (<i>Verschulden</i>).
Switzerland	art. 41 CC	unlawfulness (<i>illicéité, Widerrechtlichkeit</i>) & fault. (<i>faute, Verschulden</i>)

II. Proof of fault

- **Proof of fault as a “malapropism”**
- Always about demonstrating material facts which underlie the qualification of a fault / wrongfulness / ...
- Differences come across regarding subjective element
 - Culpability
 - Left behind (Civ. 1re 20 juill. 1976 in France – art. 165 BW in The Netherlands)
 - Burden of proof of inculpability on tortfeasor (§ 827 BGB in Germany)
 - Burden of proof of culpability on victim (Belgium)
 - Attribution of unlawful act
 - Closely related to justification ground
 - Violation of criminal law provision in Belgian law (E.g. Cass. 30 sept.. 2004, Cass. 7 maart 2005)



III. Proof of causation

- All systems apply *conditio sine qua non*-test
- **Proof of factual causation:** considered as very heavy, sometimes even insurmountable

Hypothetical proof

- Thought-experiment in the mind of the judge

Negative proof

- damage would not have occurred if the tortfeasor had not acted in the way he did

III. Proof of causation

- **Administration of evidence** by way of **presumptions**

- Find out the **actual cause** of the damage

- Deduction by exclusion

(e.g. Civ. 2^e, 13 oct. 1971 in France)



- Find out the **hypothetical situation**

- Making use of ‘*the normal course of events*’

(e.g. Tribunal Fédéral 7 oct. 1997 in Switzerland)



Conclusion

Proof of damage

- Art. 2:105 PETL
- Similar to some legal systems
- **cf.** § 287 ZPO in Germany, art. 42 in Switzerland

Proof of fault

- A malapropism
- Material facts
- Direct – indirect evidence

Proof of causation

- Hypothetical and negative proof
- Indirect evidence: presumptions

Thank you for your
attention

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